

11-13-2012

Piro v. State Respondent's Brief Dckt. 39358

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation

"Piro v. State Respondent's Brief Dckt. 39358" (2012). *Not Reported*. 668.
https://digitalcommons.law.uidaho.edu/not_reported/668

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

KEVIN RAY PIRO,)	
)	
Petitioner-Appellant,)	NO. 39358
)	
vs.)	
)	
STATE OF IDAHO,)	
)	
Respondent.)	

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

**HONORABLE MICHAEL E. WETHERELL
District Judge**

**LAWRENCE G. WASDEN
Attorney General
State of Idaho**

**PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division**

**LORI A. FLEMING
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534**

**ATTORNEYS FOR
RESPONDENT**

**KEVIN RAY PIRO
IDOC #71971
ICIO, C1
HOSPITAL DRIVE NORTH #23
OROFINO, ID 83544**



**PRO SE
PETITIONER-APPELLANT**

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE.....	1
Nature of the Case.....	1
Statement of Facts and Course of Proceedings	1
ISSUE.....	3
ARGUMENT	4
Piro Has Failed To Show Error In The Summary Dismissal Of His Second Successive Post-Conviction Petition.....	4
A. Introduction	4
B. Standard Of Review	4
C. Piro Failed To Allege Facts That, If True, Constituted A Sufficient Reason Entitling Him To File A Successive Petition	5
CONCLUSION.....	9
CERTIFICATE OF MAILING	9

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Aeschliman v. State</u> , 132 Idaho 397, 973 P.2d 749 (Ct. App. 1999)	4
<u>Charboneau v. State</u> , 144 Idaho 900, 174 P.3d 870 (2007)	6, 8
<u>Edwards v. Conchemco, Inc.</u> , 111 Idaho 851, 727 P.2d 1279 (Ct. App. 1986)	4
<u>Ferrier v. State</u> , 135 Idaho 797, 25 P.3d 110 (2001)	5
<u>Hernandez v. State</u> , 133 Idaho 794, 992 P.2d 789 (Ct. App. 1999)	7
<u>Matthews v. State</u> , 122 Idaho 801, 839 P.2d 1215 (1992)	4
<u>Palmer v. Dermitt</u> , 102 Idaho 591, 635 P.2d 955 (1981)	7
<u>Piro v. State</u> , 146 Idaho 86, 190 P.3d 905 (Ct. App. 2008)	1
<u>Pratt v. State</u> , 134 Idaho 581, 6 P.3d 831 (2000)	5
<u>Rhoades v. State</u> , 148 Idaho 247, 220 P.3d 1066 (2009)	7, 8
<u>Schwartz v. State</u> , 145 Idaho 186, 177 P.3d 400 (Ct. App. 2008)	7, 8
<u>State v. Lovelace</u> , 140 Idaho 53, 90 P.3d 278 (2003)	5
<u>State v. Piro</u> , 141 Idaho 543, 112 P.3d 831 (Ct. App. 2005)	1
<u>Stuart v. State</u> , 118 Idaho 865, 801 P.2d 1216 (1990)	5
<u>Workman v. State</u> , 144 Idaho 518, 164 P.3d 798 (2007)	5

STATUTES

I.C. § 18-1401	1
I.C. § 18-1601	1
I.C. § 19-4902	6, 7
I.C. § 19-4906	5
I.C. § 19-4908	6, 7

STATEMENT OF THE CASE

Nature of the Case

Kevin Ray Piro appeals, *pro se*, from the district court's order summarily dismissing his second successive petition for post-conviction relief.

Statement of Facts and Course of Proceedings

The district court summarized the facts and procedural history of Piro's underlying criminal conviction and prior post-conviction proceedings as follows:

On September 17, 2002, Mr. Piro was indicted for Rape (I.C. § 18-1601) and Burglary (I.C. § 18-1401). Ultimately, on August 26, 2003, a jury found Mr. Piro guilty of both counts. Mr. Piro subsequently filed an appeal, in which his conviction was affirmed on January 8, 2005. He then filed a petition for post-conviction relief on October 3, 2005, which was denied by the Court on August 7, 2006, and was affirmed by the Court of Appeals on August 18, 2008. During the pendency of the appeal of his first petition for post-conviction relief, Mr. Piro filed another petition for post-conviction relief on March 23, 2007. The second petition was summarily dismissed on May 7, 2007, and the Court of Appeals affirmed that dismissal on February 4, 2008.¹

(R., p.81.) See also State v. Piro, 141 Idaho 543, 112 P.3d 831 (Ct. App. 2005); Piro v. State, 146 Idaho 86, 190 P.3d 905 (Ct. App. 2008).

On August 8, 2011, Piro filed a second successive post-conviction and affidavit in support thereof, alleging numerous claims of ineffective assistance of

¹ Although not determinative of the resolution of this case, Piro contends, and Idaho Supreme Court records corroborate, that Piro's appeal from the summary dismissal of his first successive post-conviction petition was actually dismissed pursuant to Piro's own motion "because the allegations were without merit." (Appellant's brief, p.5; see also R., p.10 ("Petitioner filed a Successive Post-conviction Petition and subsequently, through counsel, dismissed the Petition on appeal."); 12/10/07 Motion To Dismiss, 12/12/07 Order Granting Motion To Dismiss, and 12/13/07 Remittitur filed in S.Ct. Docket No. 34222.)

trial counsel. (R., pp.3-37.) The state answered the petition and moved to dismiss it on the grounds that the petition was both untimely and an improper successive petition. (R., pp.47-56.) The district court thereafter entered an order denying Piro's motion for the appointment of counsel and giving notice of its intent to summarily dismiss the petition on the basis that Piro failed to allege facts that, if true, constituted a sufficient reason for bringing his ineffective assistance of trial counsel claims in a successive petition. (R., pp.57-60.) Piro filed a response to the court's notice of intent to dismiss, arguing therein that post-conviction counsel was ineffective for not raising or, alternatively, abandoning Piro's ineffective assistance of counsel claims in the original post-conviction proceeding, and that such ineffective assistance constituted a sufficient reason permitting Piro to assert and/or reassert the claims in his second successive petition. (R., pp.66-80.) The district court rejected Piro's arguments and summarily dismissed his second successive petition in its entirety. (R., pp.81-83.) Piro timely appealed.² (R., pp.84-87.)

² The district court granted Piro's motion for the appointment of counsel to represent Piro in this appeal. (R., p.98.) However, counsel subsequently withdrew from the representation of Piro based on counsel's inability, after a "conscientious review of the record," to identify any "non-frivolous issue" that could be raised on appeal. (7/10/12 Motion For Leave To Withdraw As Counsel And To Suspend The Briefing Schedule, p.1; 7/10/12 Memorandum In Support Of Motion To Withdraw As Counsel, pp.1, 8-9; 7/30/12 Order Granting Motion For Leave To Withdraw As Counsel And Suspend Briefing Schedule.) Piro has proceeded in the appeal *pro se*. (See Appellant's brief.)

ISSUE

Piro's opening brief does not contain an issue statement. The state phrases the issue on appeal as:

Has Piro failed to show error in the summary dismissal of his second successive petition for post-conviction relief?

ARGUMENT

Piro Has Failed To Show Error In The Summary Dismissal Of His Second Successive Post-Conviction Petition

A. Introduction

Piro challenges the summary dismissal of his second successive post-conviction petition, arguing as he did below that “[t]he operative facts supporting [his] ineffective assistance of trial counsel [claims] was [sic] not raised in the first post-conviction application due to the ineffective assistance of first appointed post-conviction counsel.” (Appellant’s brief, p.5.) Piro has failed to error because the facts he alleges, even if true, do not constitute a sufficient reason entitling him to raise his ineffective assistance of counsel claims in a successive post-conviction petition filed three years after the final determination of his original post-conviction petition and more than six years after the judgment entered upon his rape and burglary convictions became final.

B. Standard Of Review

On appeal from summary dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant’s favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999). Appellate courts freely review whether a genuine issue of material fact exists. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

C. Piro Failed To Allege Facts That, If True, Constituted A Sufficient Reason Entitling Him To File A Successive Petition

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief in response to a party's motion or on the court's own initiative. "To withstand summary dismissal, a post-conviction applicant must present evidence establishing a prima facie case as to each element of the claims upon which the applicant bears the burden of proof." State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)). Thus, a claim for post-conviction relief is subject to summary dismissal pursuant to I.C. § 19-4906 "if the applicant's evidence raises no genuine issue of material fact" as to each element of petitioner's claims. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007) (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297. While a court must accept a petitioner's un rebutted allegations as true, the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001)). If the alleged facts, even if true, would not entitle the petitioner to relief, the trial court is not required to conduct an evidentiary hearing prior to dismissing the petition. Id. (citing Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990)).

The district court summarily dismissed Piro's second successive post-conviction petition on the basis that Piro failed to allege facts, that if true,

constituted a sufficient reason to overcome the statutory bar to successive petitions. Pursuant to I.C. § 19-4908, all claims for post-conviction relief must be raised in an original, supplemental, or amended petition. An original petition must be filed within one year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever is later. I.C. § 19-4902(a). If an initial post-conviction action was timely filed, an inmate may file a subsequent petition outside of the one-year limitation period if the court finds a ground for relief asserted that for “sufficient reason” was not asserted or was inadequately raised in the original, supplemental, or amended petition. I.C. § 19-4908; Charboneau v. State, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007). While I.C. § 19-4908 sets forth no fixed time within which successive petitions may be filed, the “sufficient reason” language in the statute necessarily contemplates “a reasonable time within which such claims [may be] asserted in a successive post-conviction petition, once those claims are known.” Charboneau, 144 Idaho at 905, 174 P.3d at 875. Thus, the determination of whether a “sufficient reason” exists to permit the filing of a successive petition necessarily includes an analysis of whether the claims being made were asserted within a reasonable period of time. Id.

Application of the above legal principles to the facts of this case supports the district court's determination that Piro's second successive petition was not a proper successive petition. The second successive petition, filed more than six years after final judgment, and approximately three years after the final

determination of Piro's first post-conviction application, alleged numerous claims of ineffective assistance of trial counsel. (R., pp.3-37.) Under Idaho law, ineffective assistance of counsel claims are presumed to be known when they occur. See Rhoades v. State, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009) (claims of ineffective assistance of trial counsel "should be reasonably known immediately upon the completion of the trial"). Thus, unless Piro alleged facts demonstrating a sufficient reason why his ineffective assistance of trial counsel claims were either not asserted or were inadequately asserted in his original post-conviction petition, such claims were time-barred and were not properly raised in a successive application. I.C. §§ 19-4902(a), 19-4908; Rhoades, 148 Idaho at 253, 220 P.3d at 1072.

Piro alleged below and argues again on appeal that the failure to raise and/or adequately assert his ineffective assistance of counsel claims in his first post-conviction petition was due to ineffective assistance of his first post-conviction counsel. (R., pp.3-8, 66-79; Appellant's brief, pp.5-8.) While not a separately cognizable basis for post-conviction relief, ineffective assistance of prior post-conviction counsel may, in some circumstances, constitute "sufficient reason" to permit newly asserted allegations or allegations inadequately raised in the initial petition to be raised in a successive post-conviction petition. Palmer v. Dermitt, 102 Idaho 591, 596, 635 P.2d 955, 960 (1981); Schwartz v. State, 145 Idaho 186, 189, 177 P.3d 400, 403 (Ct. App. 2008); Hernandez v. State, 133 Idaho 794, 798, 992 P.2d 789, 793 (Ct. App. 1999). To constitute a "sufficient reason," however, such allegations must be raised within a "reasonable time"

from the date the petitioner knew or reasonably should have known the facts giving rise to the claims of ineffective assistance of post-conviction counsel. Charboneau, 144 Idaho at 905, 174 P.3d at 875. Even assuming the truth of Piro's allegations that prior post-conviction counsel was ineffective for not asserting and/or abandoning Piro's ineffective assistance of trial counsel claims, such allegations do not constitute a "sufficient reason" to permit the filing of Piro's successive petition because Piro failed to raise those allegations within a reasonable period of time.

The district court denied Piro's original post-conviction petition in August 2006, and that denial was affirmed on appeal in August 2008. (R., p.81.) Giving Piro every benefit of the doubt, he is deemed to have known the facts underlying his ineffective assistance of post-conviction counsel claims no later than the final determination of his original post-conviction action in August 2008. Rhoades, 148 Idaho at 253, 220 P.3d at 1072. However, the first time Piro asserted those claims was in his second successive post-conviction petition filed on August 8, 2011 – three years after the final dismissal of his first post-conviction action. (R., pp.3-8; see also R., pp.66-79 (October 2011 response to court's notice of intent to dismiss).) On this record there can be no doubt that Piro failed to file his second successive petition within a reasonable time. See, e.g., Charboneau, 144 Idaho at 905, 174 P.3d at 875 (thirteen-month delay in filing petition, without explanation, was "simply too long a period of time to be reasonable"); Schwartz, 145 Idaho at 191-92, 177 P.3d at 405-06 (almost twelve months from date Schwartz was aware of claims was too long a period to be reasonable). Having

failed to do so, Piro necessarily failed to establish a "sufficient reason" to overcome the statutory bar to his successive petition. Piro has therefore failed to establish any basis for reversal of the district court's order of summary dismissal.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order summarily dismissing Piro's second successive post-conviction petition.


DATED this 13th day of November 2012.


LORI A. FLEMING
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 13th day of November 2012, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

KEVIN RAY PIRO
IDOC #71971
ICIO, C1
HOSPITAL DRIVE NORTH #23
OROFINO, ID 83544


LORI A. FLEMING
Deputy Attorney General

LAF/pm